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No.:_____

IN THE

Supreme Court of the United States

October Term, 1984

ROBERT STERLING,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Questions Presented

1. Whether the evidence, viewed in the light most favorable to the government, was sufficient to support petitioner's conviction for violating 21 U.S.C. § 848?

2. Whether the trial court's failure to comply with the requirements of 18 U.S.C. § 3500 mandates reversal of the convictions on Counts 2 and 3?

3. Whether the trial court's limitation of the cross-examination of three government witnesses violated petitioner's Sixth Amendment right to confrontation?

4. Whether the prosecutor's summation exceeded the bounds of fair comment, thereby denying petitioner his right to a fair trial?

5. Whether the trial court's refusal to grant the defense a short continuance to present crucial evidence denied petitioner a fair opportunity to contest the forfeiture of his holdings?

List of Parties

Apart from the party named in the caption of this Petition, no other parties were involved in the trial of this matter.

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No.:_____

IN THE

Supreme Court of the United States

October Term, 1984

ROBERT STERLING,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Robert Sterling, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the judgment of conviction entered against him by the United States District Court for the Western District of Washington (Tanner, J.).

Opinions Below

The opinion of the Court of Appeals appears in the appendix hereto at pp. 1a-12a, while the court's denial of petitioner's motion for a rehearing, with a suggestion that it be *en banc*, appears at 13a.

Jurisdiction

The date of the judgment of the United States Court of Appeals for the Ninth Circuit was November 20, 1984. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Statutory and Constitutonal Provisions Involved in the Case

1. U.S. Const., Amend. V;
2. U.S. Const., Amend. VI;
3. 18 U.S.C. § 3500;
4. 21 U.S.C. § 848.

The texts of these provisions appear in Appendix C.

Statement of the Case

Robert Sterling was convicted, after a jury trial, of one violation of 21 U.S.C. § 848, one violation of 21 U.S.C. § 846, one violation of 21 U.S.C. § 963, seven violations of 18 U.S.C. § 1952(a)(3), two violations of 21 U.S.C. § 952, and one violation of 21 U.S.C. § 841. He was sentenced to 40 years imprisonment on the § 848 conviction and four-year terms of imprisonment, to run consecutive to each other but concurrent to the 40-year sentence, on the seven violations of § 1952, the two violations of § 952 and the violation of § 841. Because §§ 846 and 963 are lesser included offenses of § 848, Sterling was not sentenced on these two charges. In addition, the court fined Sterling a total of $225,000 and ordered forfeiture as to seven real and personal properties owned by him.

Evidence At Trial

In late July of 1981, Drug Enforcement Administration agents interrupted a large-scale marijuana smuggling operation in Bellingham, Washington; 24,290 pounds of marijuana were seized and many participants

in the scheme were arrested. (I: 519)[1] Some eight months later, with almost all of those arrested in Bellingham having decided to better their position by "cooperating" with the government, Sterling was arrested and charged with having masterminded the operation. The events in Bellingham were portrayed by the government as being just one part of a much larger marijuana operation that dated back to 1976.

The Bellingham Operation

At the center of the government's case was Philip Griffin, who testified that, beginning in the Spring of 1980, he made arrangements with Stan Wilde, Jim Parks and James Lawrence to have the vessel named "Tiki" available to off-load a large shipment of marijuana on the west coast. Griffin undertook this task at Sterling's request. (I: 169-80) The following year, Griffin and his partner, Kenneth Simmons, met with Sterling in Florida on two occasions. Sterling told Griffin that the people in California should take their boat to Bellingham, Washington. Sterling further instructed Griffin to be in Bellingham when the "Tiki" arrived and to introduce the California people to Henry Foundas, "the man he had handling the operation" in Washington. (I: 182-86)

When the "Tiki" arrived in late June, Griffin arranged the meeting between Foundas and Lawrence. Also present at the meeting were Simmons and Foundas' son, John. (I: 188; II: 385-86) Griffin returned to Washington in July to pass word that there had been delays in the arrival of the "mother ship" and that all parties would be informed as to its progress. This information was conveyed to Lawrence, Foundas and several other people working with Foundas at a meeting in the house on Chuckanut Drive in Bellingham which was to be used as the off-loading point for the vessel. (I: 195-97)

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[1] The reporter's transcript of the trial in this case consists of two sets of transcripts, each with its own numbering. Accordingly, the number "I" refers to the first set of transcripts, which begin with the proceedings of August 2, 1982, and the number "II" refers to the second set, which begins with the proceedings of August 9, 1982.

Griffin returned on July 21 because Lawrence wanted someone other than Foundas to come to Washington so that he [Lawrence] could have more direct communication with Sterling. (I: 199)[2] This decision was prompted by the fact that the "mother ship" was having mechanical difficulties. (I: 203-04) The next day, Griffin met with Foundas and Lawrence, who were attempting to communicate with the mother vessel to find out the status of its repairs, using a radio located in the truck of co-conspirator Philip Spiesz. (I: 205) Spiesz later told Lawrence and Griffin that he had contacted the ship and that, although it was still having difficulties, it was under its own power and moving well. (I: 208)

Thereafter, on July 25, Simmons arrived in Bellingham to help Griffin deal with Lawrence and Foundas. (I: 212) That same day, Sterling told Griffin that he too was coming to Seattle because the Colombians wanted him to be there. (I: 213) Later that day, the three men met and discussed the mother ship's problems and Foundas' handling of the operation. Sterling, though, evinced "confidence and faith in Mr. Foundas, who had worked for him before." (I: 213-14)

Over the next two days, Griffin and Lawrence were in touch with Sterling over the telephone. (I: 215) On July 27th, Sterling called Griffin and told him that something strange was going on at the Chuckanut Drive house because "someone other than he had recognized or knew answered the telephone." (I: 217) Thereafter, Lawrence, Simmons and Griffin took a boat to a location near the house and saw the Coast Guard towing away the other off-loading vessel, "Courageous." This information was conveyed to Sterling, who was also told that, because the "Tiki" had not been found, Griffin was unsure if there had been a "bust" or if the Coast Guard was "just towing the boat away." (I: 218-19)

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[2] Lawrence did not have any personal knowledge that Sterling was in charge of the entire operation. He only knew that there was a person known as "Bobby" involved. (II: 385) He did, however, identify Sterling's voice on tape as "Bobby's" voice. (II: 448)

Of course, there had been a "bust" and, among those ultimately arrested were William Butler, the captain of the "Tiki" (I: 369-70); Manuel Zuniga-Crimmina, the captain of the "mother ship" (I: 488); Hjime Alava-Solano, a crew member on the "mother ship" (I: 477); Henry Foundas; Edwin House, the captain of the "Courageous" (I: 530); Robert Crues, who arranged for ground transportation of the marijuana (I: 722-24); John Foundas; Philip Spiesz, who was also involved in the plans for ground transportation (I: 993-94); John Norris, who had driven a van from New York to Bellingham for Foundas and helped in the unloading of the "Courageous" (I: 999, 1002); and James Lawrence.

All of these individuals testified at trial and, in addition to corroborating parts of Griffin's testimony, provided the details of the off-loading of the mother ship. However, although a few of those witnesses recalled hearing the name "Bobby" used in connection with the operation (I: 373, 401-02, 536-37, 386), only two of them, aside from Griffin, were able to directly tie Sterling to the Bellingham operation. Crues testified that, in late June of 1981, Sterling directed him to "round up a couple of vans for an operation on the west coast" and that, after the marijuana had been unloaded from the "Courageous" into the Chuckanut Drive house, he brought a sample of it to Sterling in Seattle. (I: 719, 741) Stephen Cubberly testified that he had purchased the Chuckanut Drive house at Sterling's direction (II: 36-38) and had delivered a "nightscope" to Sterling in Seattle on July 26. (II: 44-45)

The Pre-Bellingham Conspiracy

As noted, the government claimed that the operation in Bellingham was just the last episode in Sterling's decade-long involvement in marijuana. Accordingly, Sterling was also charged, in Count 3, with participation in a conspiracy, dating back to an undetermined date in 1976, to violate 18 U.S.C. § 841 by distributing and possessing with intent to distribute an amount of mari-

juana in excess of 1,000 pounds. Apart from the Bellingham operation, which was both charged separately, in Count 2, as a conspiracy to import controlled substances and also incorporated into Count 3, almost all of this activity took place in eastern United States.

There was a large cast of characters in this conspiracy, each of whom, according to the government, had a well-defined role. First, there was Marvin Levy, who apparently acted as a cashier for the organization and played a supervisory role. (II: 85) Levy did not testify at trial, but tapes of his conversations with Sterling were introduced into evidence. (I: 943)

Second, there were Sterling's major purchasers. Herbert Kessler stated that he had started purchasing marijuana from Sterling in 1971. (I: 849) Initially, the two men dealt in amounts of 10 to 20 pounds. As time went on, though, the magnitude of their transactions grew, and by 1972, Kessler was receiving 100-pound amounts of marijuana on a weekly basis from Sterling. (I: 851) According to Kessler, Sterling was paying him to store the marijuana in his house on Long Island and, at the same time, allowed him to sell the drug. (I: 855) This relationship continued into 1978 (I: 884), with Kessler even investing capital for Sterling's ventures so that he would have access to greater quantities of Sterling's marijuana at a lower price. (I: 859)

Eleanor Kessler, Herbert Kessler's estranged wife, began her business relationship with Sterling in the Spring of 1979, when, according to Mrs. Kessler, Sterling asked her if she would be interested in selling marijuana for him. (II: 71) By the Summer of 1979, she was receiving from one to three or four car trunk loads of marijuana a week. (II: 75) This relationship lasted for 15 months, until her arrest on April 28, 1980. (II: 155)

William Lasky testified that his involvement with Sterling began in 1971, when he was acquiring one pound of marijuana at a time. (II: 473-74) However, Lasky's role grew and, by 1974, he was running a "stash house" in New Jersey and distributing, with Sterling's advice, the marijuana coming to the "stash house."

(II: 496-97, 504) In 1975, their relationship soured and they lost contact for approximately a year and a half. (II: 505)[3] Yet, in the Summer of 1976, Lasky began purchasing marijuana and hashish from Sterling. At the same time, Lasky worked for Sterling as a driver of vehicles containing marijuana. (II: 507-09, 513, 543) In 1979, Lasky stopped working as a driver and devoted himself solely to selling marijuana. (II: 545) With Sterling as his supplier, Lasky continued selling marijuana into 1980. (II: 553) At times, Sterling apparently supplied quantities of marijuana weighing thousands of pounds. (II: 545, 551, 553)

The next alleged distributor of Sterling's marijuana was Stephen Cubberly, who claimed that, in February of 1981, he helped facilitate the transfer of cash to Switzerland for Sterling. (II: 25-28) He also testified that, in the Winter of 1981, he sold approximately 2,000 pounds of Sterling's marijuana in Columbus, Ohio. (II: 31-33) In addition, at Sterling's direction, Cubberly purchased the house on Chuckanut Drive with funds earned wholly through the sale of Sterling's marijuana. (II: 38)[4]

Testifying about their role at the third level of the conspiracy were Randall Segarra, Kathleen Hume and Philip Spiesz. Segarra testified that, in 1979 and 1980, he was employed by Eleanor Kessler as a driver who transported marijuana. (I: 546-47) Although Segarra had met Sterling once at Kessler's home (I: 551), he never heard the name "Sterling" used during his whole time of employment by Kessler. (I: 559-60) However, he did have 10 or 15 brief telephone conversations with a "Bob." (I: 560)

Hume, who had shared an apartment with Mrs. Kessler in 1979, testified that she had twice gone to Florida at Kessler's request to deliver money. (I: 619-23) Then, in early 1980, she flew to Florida again and drove

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[3] All of this activity described by Lasky fell outside of the scope of Count 3, as it occurred prior to 1976.

[4] Lawrence Schlosser also testified that, for a period of six to eight months in 1978 or 1979, he regularly received quantities of 50 to 100 pounds of marijuana from Sterling. (II: 464-65)

to Kessler's house. (I: 624) Kessler took her to a house to which she [Hume] had delivered money on a prior trip. Hume met Sterling there and received instructions from him. (I: 625) Philip Spiesz testified that he had picked up marijuana from Hume that day. (I: 986)

The Defense Case

Sterling's defense understandably focused upon the operation in Bellingham, which, with the exception of Count 3, was the source of all charges against him.[5] To this end, Andrew Parks, the one participant in the Bellingham operation who testified without the benefit of an agreement with the government, stated that, to his knowledge, Griffin was the mastermind of the Bellingham affair. He reached this conclusion because Griffin always spoke as though the money spent on the Bellingham caper was his own. (II: 748, 761) Moreover, Parks contradicted Griffin's testimony that he [Griffin] knew of, but did not have any contact with Sterling's Colombian marijuana connection, a person known as "I." (I: 158, 164) Parks testified that Griffin and Simmons introduced him to their "Colombian connection" in Florida. (II: 748-49) The name of this person was Isaac. (*Id.*)

More important, though, was the virtually indisputable evidence that Sterling had not been in Seattle on the weekend of July 25, 1981, namely his passport which indicated that he had been in the Bahamas. (II: 778) This evidence destroyed the probative value of the testimony of Griffin, Crues, and Cubberly, which tied

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[5] In addition to the § 848 charge and the two charges of conspiracy, which merged into the § 848 conviction, Sterling was charged and convicted of inducing Bill Caudell (Count 4), Stephen Cubberly (Count 5), Edwin House (Count 6), Philip Griffin (Count 7) and William Butler (Count 8) to travel in interstate commerce in furtherance of the conspiracy (18 U.S.C. § 1952(a)(3)). Similar charges as to Butler's trip into Canadian territory and back comprised Counts 9 and 12 of the indictment. Finally, Sterling was charged with importing marijuana at Bellingham on the "Courageous" (Count 13) and the "Tiki" (Count 14), and possession with intent to distribute an amount of marijuana in excess of 1,000 pounds (Count 15).

Sterling to Bellingham. Moreover, there was the unimpeachable testimony of Bahamian Agriculturist, Clement Pinder, who stated that Sterling arrived in the Bahamas on July 25th and stayed until July 27th. The purpose of that visit was to discuss the possible production of a motion picture in the Bahamas. (II: 783)

Reasons for Granting the Writ

I. The Evidence, Viewed in the Light Most Favorable to the Government, Was Insufficient to Support Petitioner's Conviction for Violating 21 U.S.C. § 848.

In prosecuting Sterling for violating § 848, the government was required to prove (1) that Sterling had violated federal narcotics laws and (2) that the violation was part of a "continuing series of violations" of those laws, from which he derived substantial income or resources, that were undertaken by Sterling in concert with five or more other persons with respect to whom he occupied "a position of organizer, a supervisory position, or any other position of management." At issue here is the government's showing of Sterling's participation in a "continuing series of violations" of the narcotics laws. In meeting this requirement of § 848, "there is a consensus of authority that . . . the government must prove at least three felony violations." *United States v. Young (Myers),* ____ F.2d ____, slip op. at 6246 (2d Cir. Sept. 17, 1984), *cert. petition filed* Dec. 13, 1984. *See also, United States v. Chagra,* 653 F.2d 26, 27-28 (1st Cir. 1981), *cert. denied,* 455 U.S. 907 (1982); *United States v. Valenzuela,* 596 F.2d 1361, 1367 (9th Cir.), *cert. denied,* 444 U.S. 865 (1979). Here, the government proved only one or, at most, two such violations.

A. The Ninth Circuit Incorrectly Held That Offenses Not Explicitly Charged May Be Used to Meet the "Continuing Series of Violations" Requirement of § 848.

In holding that the government had met its burden with respect to proving a "continuing series of violations", the Ninth Circuit relied heavily on the Second Circuit's holding in *Sperling v. United States*, 692 F.2d 223, 226 (2d Cir. 1982), *cert. denied*, ____ U.S. ____, 103 S.Ct. 3111 (1983), that offenses not explicitly charged in the indictment may be used to meet this requirement. The court reasoned that, since the government had presented proof of numerous narcotics violations at trial, the evidence of Sterling's guilt of violating § 848 was sufficient to sustain the conviction. (Appendix A at 8a) This conclusion was plainly incorrect.

Either an indictment means something or it does not. This Court has said that it does. "The very purpose of the requirement that a man be indicted by a grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge." *Stirone v. United States*, 361 U.S. 212, 218 (1960). Consequently, "[e]ver since *Ex parte Bain*, 121 U.S. 1 . . . was decided in 1887, it has been the rule that after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself." *Id.* at 215-16. In *Bain*, the Court explained that if either prosecutors or judges ignore a grand jury's allegations

> the great importance which the common law attaches to an indictment by a grand jury as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says "no person shall be held to answer," may be frittered away until its value is almost destroyed.

Ex parte Bain, supra, 121 U.S. at 10.

There is, of course, no exception to the principle articulated in *Stirone* and *Bain* for § 848 prosecution. Thus, at a constitutional minimum, the offenses constituting the predicate "continuing series of violations"

must be charged in the § 848 count itself. Here, of course, the government's theory of its § 848 case was spelled out in Count 1.[6] The trial court's failure to adhere to this theory and the Ninth Circuit's affirmance of this decision, thus, constitute an impermissible amendment of the indictment.

B. The Three Substantive Offenses Relating to the Bellingham Operation Did Not Alone Satisfy the "Continuing Series of Violations" Requirement of § 848.

The Ninth Circuit went on to hold that, even if the trial court was limited to the offenses specified in Count 1, the government had met its burden because the violations alleged in Counts 13, 14 and 15 could sustain Sterling's § 848 conviction. (Appendix A at 9a-10a) This ruling was clearly incorrect for these crimes arise out of the same transaction: the importation of marijuana from the "mother ship." Plainly stated, the government cannot take one smuggling operation, break it down into three separate crimes, and then claim that § 848's "continuing series of violations" requirement has been met. As a matter of common sense, it is clear that three separate statutory violations arising out of the same transaction and which took place over a two-day period do not amount to a "continuing series of violations." Further, when one considers that Counts 13 and 14 allege separate crimes only by virtue of the fact that the marijuana was off-loaded from the mother ship onto two separate ships, the absurdity of the government's position here is even more fully exposed.

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[6] According to the government, the necessary "continuing series of violations" consisted of the Bellingham conspiracy to import marijuana (Count 1), the broader conspiracy to violate § 841 (Count 3), the importation of marijuana on the "Courageous" (Count 13), the importation of marijuana on the "Tiki" (Count 14), and the possession with intent to distribute an amount of marijuana in excess of 1,000 pounds (Count 15).

The legislative history makes clear that § 848 does not apply to one who becomes involved in, and masterminds, one discrete scheme to violate the narcotics laws. Rather, in the words of Senator Thurmond, the statute was designed to prosecute "a class of professional criminals who are involved in distribution, sale and importation of controlled dangerous substances on major scale." 116 CONG. REC. 1181 (1970). *See also* Remarks of Senator Dodd, 116 CONG. REC. 996 (1970). The meaning of the term "professional criminal" was, during a different debate, elucidated by Congressman Springer, who gave as an example a person who sold marijuana and LSD in five different cities over a period of several months. 116 CONG. REC. 33628 (1970).

Unquestionably, the prosecution of a person for leading just one smuggling operation is not consistent with the archetypal § 848 violator described by Congressman Springer. Moreover, it would be ridiculous to suggest that Congress provided for possible life imprisonment without parole for one who has proven to be involved in only one plan to violate the narcotics laws. Participation in just one such conspiracy, even at an organizational level, could well be an aberrational event in a person's life. Clearly, such a person would not be the type of "professional criminal" at whom Congress directed the continuing criminal enterprise statute.

Yet, even if this Court concludes that participation in merely one scheme can support a § 848 conviction, the government's proof here was inadequate because Counts 13 and 14, which charged Sterling with the importation of marijuana from the "mother ship" onto the "Courageous" (Count 13) and the "Tiki" (Count 14) must be viewed, for § 848 purposes, as only one crime. Thus, even assuming that the Bellingham operation could properly be split up into various crimes, the government only made out its case as to two, rather than the required three, violations of the narcotics laws: one violation of the law prohibiting importation of marijuana (Counts 13 and 14) and one violation of the law prohibiting possession of marijuana with intent to distribute it (Count 15).

"It has long been the law that a prosecutor cannot divide a continuing crime into bits and prosecute separately for each." *United States v. Chagra, supra,* 653 F.2d at 29. Yet, this is precisely what occurred in the present case. The evidence at trial showed that the "Tiki" and the "Courageous" both met the "mother ship" at the same time. (I: 389) They were unquestionably part of a unitary scheme to off-load the marijuana and return it to the Chuckanut Drive house. Surely, the prosecution should not be able to manufacture two crimes out of one importation simply because two boats were needed.

To allow this multiplication of crimes would conflict with a jurisprudential tradition that dates back over 200 years. In *Crepps v. Durden,* 2 Cowper's Reports 640, 98 Eng. Rep. 1283 (K.B. 1777), Lord Mansfield held that a baker could not be convicted four times for violating a statute prohibiting work on Sunday because he had baked four loaves of bread. Similarly, in *In Re Snow,* 120 U.S. 274 (1887), this Court held that a Mormon could be prosecuted only once, rather than three times, for cohabitating with more than one woman for three consecutive years. More recently, in *United States v. Corbin Farm Services,* 578 F.2d 259 (9th Cir. 1978), the Ninth Circuit itself held that multiple duck deaths resulting from a single transaction cannot be charged as separate violations of the Migratory Bird Treaty Act.

There is, then, simply no basis upon which two crimes can be properly manufactured out of one incident of illegal importation of marijuana. 21 U.S.C. § 952(a) states that "[i]t shall be unlawful to import into the customs territory of the United States from any place outside thereof . . . any controlled substance." The broad scope of the statute's language in no way suggests that the proper "unit of prosecution" is the number of vessels used in the process of a single act of importation. Accordingly, this is not a case such as *United States v. Alverson,* 666 F.2d 341 (9th Cir. 1982), in which the court held that where a person possesses three unregistered firearms in violation of 26 U.S.C. § 5861(d), he is liable for three charges of violating that statute, rather than just

one charge. In *Alverson*, the court found that the language of the statute, making it unlawful for any person to "receive or possess *a* firearm" (emphasis supplied) expressed "an unambiguous congressional intent to make each firearm a unit of prosecution." 666 F.2d at 347. Here, though, the intent of Congress cannot be so easily made out. For this reason, the Ninth Circuit's view of the applicable unit of prosecution must be rejected.

As this Court stated in *Bell v. United States*, 349 U.S. 81, 83-84 (1955): "[I]f Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses." This rule is clearly applicable here. Thus, because Congress did not make clear its views concerning the proper unit of prosecution under § 952, Counts 13 and 14 must be viewed as just one violation for the purposes of § 848. Thus, beyond the two conspiracies alleged in Counts 2 and 3 of the indictment, there remain at most two violations — the importation of the marijuana and its subsequent possession by Sterling — to support the § 848 charge.

C. The Conspiracies Alleged in Counts 2 and 3 of the Indictment Cannot Be Used to Meet the "Continuing Series of Violations" Requirement of § 848.

In view of its holding that the charges contained in Counts 13, 14 and 15 could sustain Sterling's conviction, the Ninth Circuit found it unnecessary to reach the issue of whether the §§ 846 and 963 conspiracies charged in Counts 2 and 3 could properly be used as predicates. (Appendix A at 9a) However, since without these counts, the government failed to prove "a continuing series of violations," this issue should have been addressed and petitioner's argument sustained.

In *Jeffers v. United States*, 432 U.S. 137, 149-50 (1977), this Court made clear, although it did not so hold, that a § 846 conspiracy is a lesser included offense of § 848 "because § 848 requires proof of every fact necessary to show a violation under § 848 as well as proof of several

additional elements." That is, § 848's "in concert" element is, in essence, a requirement that a conspiracy be proven. What distinguishes § 848 from § 846 is § 848's additional proof obligations as to the number of co-conspirators, the existence of a supervisory capacity, the derivation of substantial income, and the existence of a "continuing series of violations."

Subsequent to *Jeffers*, numerous courts have adopted the above analysis and held that § 846 is a lesser included offense of § 848. *See e.g., United States v. Graziano*, 710 F.2d 691 (11th Cir. 1983); *United States v. Smith*, 703 F.2d 627, 628 (D.C.Cir. 1983); *United States v. Samuelson*, 697 F.2d 255, 259 (8th Cir. 1983); *United States v. Smith*, 690 F.2d 748, 750 (9th Cir. 1982), *cert. denied*, ____ U.S. ____, 103 S.Ct. 1435 (1983). Moreover, as the Fifth Circuit has held, the rationale of *Jeffers* applies to § 963, which punishes conspiracies to import, rather than distribute, controlled substances. *United States v. Michel*, 588 F.2d 986, 1001 (5th Cir.), *cert. denied*, 444 U.S. 825 (1979).

Petitioner contends that, because §§ 846 and 963 are lesser included offenses of § 848, they cannot serve as the underlying violations of the narcotics laws used to meet § 848's requirement of a "continuing series of violations." This contention has caused much controversy in the lower courts, resulting in a split between the circuits. Thus, the Fourth, Fifth and Seventh Circuits have held that proof of a § 846 violation may be used only to prove § 848's "in concert" element. *United States v. Jefferson*, 714 F.2d 689, 702, n.27 (7th Cir. 1983); *United States v. Lurz*, 666 F.2d 69, 76 (4th Cir. 1981), *cert. denied*, 455 U.S. 1005 (1982); *United States V. Stricklin*, 591 F.2d 1112, 1123-24 (5th Cir.), *cert. denied*, 444 U.S. 963 (1979). In contrast, the Second Circuit held that a § 846 violation may be used to show a "continuing series of violations." *United States v. Young (Myers), supra.* This Court has yet to address this critical issue regarding the most onerous of all federal crimes.

The thrust of Petitioner's argument is that a § 846 or § 963 conspiracy cannot be used to support a § 848

conviction because to do so would contravene Congress' clear indication that the "in concert" element of § 848 is a separate and distinct part of the crime. That is, the statute unequivocally speaks of federal narcotics law "violations" which are undertaken by a defendant " 'in concert' with five or more other persons . . . ." Yet, this distinction would be wholly meaningless if a narcotics conspiracy could be used as a § 848 underlying violation. If this were the case, a finding by the jury that a defendant acted "in concert" with five or more other persons would, in itself, remove the necessity of proving, as required by § 848(b)(1), a violation of the federal narcotics law and would also reduce the number of violations needed to show a "series of violations" from three to two. Surely, Congress would not have set out the elements of a § 848 offense so carefully and explicitly only to have them merge so easily. Further, the use of a conspiracy as an underlying § 848 "violation" leads to an absurd result. One should not be able to convict a man for being the leader of a narcotics conspiracy, the essence of a § 848 charge, upon proof that he was a member of the very group that he led. *See United States v. Sperling*, 560 F.2d 1050, 1060 (2d Cir. 1977). Yet, this is the effect of the government's theory in this case.

Yet another way of demonstrating why a conspiracy cannot form the basis of a § 848 conviction is by analogy to felony-murder, a crime that is committed when a person is killed by another in the course of the commission of a felony inherently dangerous to human life. An almost universally recognized limitation on the scope of this doctrine is that the underlying felony which supports the murder charge cannot be a felony that is itself a lesser-included offense of murder. For example, a felony assault cannot be used as the underlying crime upon which a finding of felony-murder is made. *See, e.g., People v. Ireland*, 70 Cal.2d 522, 539, 75 Cal.Rptr. 188, 198, 450 P.2d 580, 590 (1969); *State v. Essman*, 98 Ariz. 228, 235, 403 P.2d 540, 545 (1965).

This reasoning is apposite in the present case. Just as an assault may not be used as a predicate for a finding

of felony-murder because to do so would relieve the prosecution of independently proving an essential element of the crime, a § 846 or § 963 conspiracy may not be used as a basis for a § 848 conspiracy because to do so would relieve the government of its obligation to independently prove that there had been the necessary three violations of the narcotics laws. In light of the severe penalties called for by § 848, the clear distinctions among elements of the crime as set out in the statute, as well as basic notions of fairness, prohibit the use of such an evidentiary shortcut by the government.

* * *

In sum, then, this case presents three issues never before addressed by this Court. Given that § 848 carries with it the highest possible federal sentence — life without parole — and that there exists considerable confusion in the lower courts regarding these issues, this Court should review the Ninth Circuit's judgment.

II. The Trial Court's Failure to Comply With the Requirements of 18 U.S.C. § 3500 Mandates Reversal of the Convictions on Counts 1 and 3.

William Lasky was crucial to the government's proof as to Counts 1 and 3 of the indictment. Having provided details of his relationship with Sterling which dated back to 1971, Lasky was viewed by the government as an important co-conspirator of Sterling's, as well as one of the people supervised by Sterling. Yet, Sterling was denied access to crucial impeachment material — Lasky's prior grand jury testimony — to which he was entitled. 18 U.S.C. § 3500 (Jencks Act).

After Lasky's first day of testimony, the government handed over all § 3500 material in its possession to Sterling's counsel. The prosecutor noted, however, that he had just learned that Lasky had testified before a federal grand jury in Syracuse, New York, and that he would request that a transcript of this testimony be delivered the following morning. (II: 521-22) When Sterling's attorney objected to commencing cross-examination without this transcript, which related to Lasky's

testimony at the instant trial, the court ruled that he had to begin cross-examination, but that Lasky would remain available until the material arrived. (II: 522) Following the close of Lasky's direct testimony, counsel again raised the issue of the failure to comply with § 3500 and asked that Lasky's testimony be stricken (II: 554) The trial court refused to do this and ordered counsel to proceed. (*Id.*) At the close of Lasky's entire testimony, the court ordered that he remain available. (II: 661)

Lasky's continued availability, however, ultimately amounted to a hollow concession by the trial court. The next morning, following the close of the defense case, the minutes of Lasky's grand jury testimony had not yet arrived. Although counsel for *both* Sterling and the government asked for a brief delay until the morning's Federal Express delivery arrived, the court insisted that jury instructions commence. (II: 799-801, 815) Thus, Sterling never gained access to the minutes. Accordingly, the defense, pursuant to 18 U.S.C. § 3500(d), again moved to strike Lasky's testimony. This motion was denied. (II: 876) There can be no doubt that the Ninth Circuit's affirmance of this ruling was erroneous.

First, it should be noted that the Circuit Court incorrectly held that "[a] trial court has the discretion not to impose sanctions for non-compliance with the dictates of the Jencks Act." (Appendix A at 5a) Simply stated, § 3500 is explicit in its mandate that where, as here, materials *must* be given to the defense, failure to produce them *requires* the court to either strike the witness' testimony or declare a mistrial. *See United States v. Well,* 572 F.2d 1383, 1384 (9th Cir. 1978).

Thus, the Ninth Circuit's reliance on its decision in *United States v. Finnegan,* 568 F.2d 637 (9th Cir. 1977); *United States v. Parker,* 549 F.2d 1217 (9th Cir.), *cert. denied,* 430 U.S. 971 (1977); and *United States v. Polizzi,* 500 F.2d 856 (9th Cir. 1974), *cert. denied,* 419 U.S. 1121 (1975), was misplaced. In contrast to the present case, all three of those cases involved the government's failure to produce materials that *might* have fallen within the

purview of the Jencks Act. *See Finnegan, supra,* 568 F.2d at 642; *Parker, supra,* 549 F.2d at 1223; and *Polizzi, supra,* 500 F.2d at 893. Here, both the Circuit and the government have conceded that the materials in question were producible under the Jencks Act. (Appendix A at 4a) This is a crucial distinction, one which was wholly ignored by the court. For, given the severe sanctions called for under the Jencks Act, a court should not be forced to impose them when it is unclear whether the Act actually has been violated. However, where, as here, there is *no question* that the Act has been violated, its sanctions *must* be imposed.

Second, the Ninth Circuit erred in holding that the fact that the government had "dutifully endeavored" to correct its "inadvertent" omission (Appendix A at 4a) justified the trial court's refusal to strike Lasky's testimony. Simply stated, the government's good faith is totally irrelevant for the "order [of the Jencks Act] is unqualified." *United States v. Beasley,* 576 F.2d 626, 631 (5th Cir. 1978), *cert. denied,* 440 U.S. 947 (1979). "In general . . . , good faith is the norm from which neither adverse inferences nor benefits flow." *United States v. Carrasco,* 537 F.2d 372, 376 (9th Cir. 1976). *But see United States v. Pope,* 574 F.2d 320, 325 (6th Cir.), *cert. denied,* 436 U.S. 929 (1978) (good faith is a relevant factor).

Third, and finally, the Circuit was not entitled to avoid a reversal by holding that Sterling was not prejudiced by this error because "[t]he New York transcript is essentially duplicative of other Lasky pretrial testimony which was given to defense counsel." (Appendix A at 6a)

In *Goldberg v. United States,* 425 U.S. 94, 111, n.21 (1976), this Court stated that "[s]ince courts cannot 'speculate whether [Jencks material] could have been utilized effectively' at trial . . . , the harmless error doctrine must be strictly applied in Jencks Act cases." In so holding, the Court adopted a test set forth by Justice Brennan in his dissenting opinion in *Rosenberg v. United States,* 360 U.S. 367, 375-76 (1959): "an appellate court should order a new trial unless the circumstances

justify the conclusion that a finding that such a denial was harmful error would be clearly erroneous." Thus, "there is a stricter standard [when § 3500 is violated] than applies in constitutional cases regarding prosecutorial non-disclosure." *United States v. Beasley, supra*, 576 F.2d at 630.

Here, of course, the trial court's failure to strike Lasky's testimony does not meet the strict harmless error test. These materials contained statements by Lasky that directly contradicted his and the government's claim that he was an underling in Sterling's alleged § 848 enterprise. At one point (P. 9; "P" referring to the grand jury minutes), Lasky speaks of working "with" Sterling instead of "for" him. Later on, he noted that his workers did for him what Sterling's workers did for Sterling (P.22) and that he had his "own personal distribution network." (P.23) Further, Lasky also stated that he needed Sterling only because he did not have Sterling's sources of supply. (P.26) All of these statements went directly to the defense claim that Lasky could not be viewed as a § 848 minion. Surely, the defense was entitled to question Lasky on that issue armed with this additional material.

Moreover, the transcript contained other matters which would have provided assistance to the defense. First, this testimony revealed for the first time that Lasky had agreed to cooperate because he was afraid that his children would be deprived of both their parents. (P.42) This statement was inconsistent with Aileen Lasky's claim that the government had assured her that she was not in danger of prosecution (II: 381-82) and raised a substantial issue concerning Lasky's motive for giving false testimony. Second, Lasky's grand jury testimony refers to Sterling's "legitimate movie and music production business." (P.16) This reference would have permitted counsel to further lay the ground for arguments that the properties subject to forfeiture under § 848 were not purchased with illegal monies.

In sum, the Ninth Circuit misapplied both this Court's teaching and its own precedent. This error calls for review by this Court, especially since the Circuit has thus created a conflict with the Sixth Circuit.

III. The Trial Court's Limitation of the Cross-Examination of Three Government Witnesses Violated Petitioner's Sixth Amendment Right to Confrontation.

In his brief below, petitioner argued that the trial court violated his Sixth amendment right to confrontation in two distinct ways. First, it rebuffed defense counsel's attempt to inquire into the extent of Stephen Cubberly's motives for testifying falsely. Second, it thwarted defense attempts to bring out its theory of the case through the cross-examination of William Lasky and Randall Segarra. The Ninth Circuit disposed of these claims in five lines, noting that "[t]he cross-examinations were vigorous and sustained, satisfying the demands of the confrontation clause." (Appendix A at 10a) This conclusion was plainly incorrect.

A. The Court Should Have Permitted Full Inquiry Into Stephen Cubberly's Motives for Testifying Falsely.

As noted, Cubberly was one of the government's most crucial witnesses because he was one of the few people whose testimony directly tied Sterling to the Bellingham conspiracy. It was Cubberly who testified that he had delivered a "nightscope" to Sterling in Seattle on July 26, 1981. (II: 36-38, 44-45) His testimony was pitted squarely against the defense evidence that Sterling had been in the Bahamas on the dates in question. Not surprisingly, then, cross-examination of Cubberly was a key to the defense case.

Unfortunately, the court improperly barred substantial inquiry into Cubberly's possible exposure to criminal liability. Trial counsel sought to inquire into arson

charges that were pending against Cubberly. (II: 310-11) At the court's suggestion, though, the government objected to this line of cross-examination, claiming that it was barred under Fed.R.Evid. 608(b). The objection was sustained. (II: 313-14) Similarly, when counsel attempted to ask Cubberly about an allegation of an attempted murder, (II: 314-15) the court sustained a government objection on the grounds of "relevance." (II: 315) Finally, the same rationale was used to bar trial counsel from questioning Cubberly about any crimes that he might have committed and that the government knew about prior to his testimony at Sterling's trial. (II: 322) All of these questions were directed towards one goal: showing that Cubberly's legal difficulties gave him strong motive to testify falsely.

This case is directly governed by *Davis v. Alaska,* 415 U.S. 308 (1974), where the prosecutor obtained a protective order preventing any questioning of his witness, Green, concerning his juvenile criminal record. Although, as here, the clear purpose of questions about Green's record was to show bias and prejudice, rather than lack of general credibility, the court did not allow any inquiry into the fact that Green was on probation for burglary.

This Court reversed *Davis*' conviction. In so holding, the court explained the crucial difference between the use of prior criminal difficulties as an attack upon general credibility and their use to show motive and bias:

> The partiality of a witness is subject to exploration at trial and, is "always relevant as discrediting the witness and affecting the weight of his testimony." We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.

415 U.S. at 316-17 (citation omitted). Accordingly, the Court found that the limitations on the cross-examination deprived Davis of his rights under the Confrontation Clause by precluding his counsel from showing *why* Green was biased.

Davis, then, makes clear that the trial court erred in restricting inquiry into Cubberly's exposure to criminal liability. Where, as here, "the bias sought to be proved was that the witness favored the prosecution in hopes of better treatment for his own crimes," *Chipman v. Mercer,* 628 F.2d 528, 531 (9th Cir. 1980), there was no legitimate basis for the trial court's restriction of cross-examination. "These instances of potential bias appear with such frequency that the necessity to permit cross-examination should be readily apparent to the trial court." *Id.*

B. The Trial Court Erred in Restricting Cross-Examination That Was Directed Towards Establishing the Defense Theory of the Case.

As its summations made clear (II: 889, 983-94), the government claimed that both Lasky and Eleanor Kessler were individuals who had been supervised, within the meaning of 21 U.S.C. § 848, by Sterling. In contrast, the defense argued that both Lasky and Kessler were independent operators whose actions did not support the § 848 charge. Thus, the cross-examination of Lasky and Randall Segarra, a former employee of Kessler, was critical. Unfortunately, though, the trial court did not provide petitioner with even a barely adequate opportunity to pursue his theory of the case.

During his questioning of Lasky, Sterling's counsel attempted to ask about the huge profits he had made from the sale of marijuana. (II: 602-03) Yet, although this information was directly relevant to an assessment of Lasky's position vis-a-vis Sterling, the trial court, stating that the questioning was beyond the scope of direct examination, sustained the government's objection. (II: 604) Moreover, after less than two hours of cross-examination (II: 603-40), the court summarily decided that it would permit only 15 more minutes of questioning, stating: "there is sufficient information in the record as to impeachment and credibility of this witness if the jury so wishes to find." (II: 643)

Through Segarra, trial counsel attempted to show that Kessler had been an independent contractor who

had other sources of marijuana. Towards this end, Segarra was asked about the other people from whom Kessler had purchased marijuana. However, although the questioning was highly relevant to the § 848 charges, the court refused to allow it because it was supposedly beyond the scope of Segarra's direct examination.

In the cases of both Lasky and Segarra, the trial court erred in concluding that the defense's line of questioning went beyond the scope of direct examination and, thus, in limiting cross-examination. The clear purpose of the government's questioning of both witnesses was to establish that Sterling was the mastermind of a § 848 enterprise. Thus, any inquiry directed towards casting doubt upon that conclusion was surely within the bounds of permissible cross-examination.

Directly relevant in this regard is *United States v. Callahan*, 551 F.2d 733 (6th Cir. 1977), where the defendant, a business agent for a union, was convicted of extorting money from a contractor. At trial, Callahan claimed that the contractor had been involved in similar confrontations with other unions and had adopted a practice of paying a cash settlement in lieu of hiring local members. On this basis, the defendant hoped to contend that the contractor had not been motivated by fear in paying him and that, therefore, a necessary element of extortion had not been proven. In the process of pursuing this defense, counsel attempted to question the contractor about prior dealings with other unions. The trial court deemed this inquiry to be irrelevant. The Court of Appeals disagreed, finding that an error of constitutional dimension had occurred. 551 F.2d at 736.

Here, too, questions directed towards showing that Lasky and Kessler had not been supervised by Sterling were surely relevant. *See* Rules 401 and 402, Fed.R.Evid.

* * *

Accordingly, then, the trial court's improper limitations on the cross-examination of Cubberly, Lasky and Segarra deprived petitioner of his Sixth Amendment right to confrontation. For this reason, a reversal of

Sterling's conviction was mandated, as "a confrontation-clause violation requires reversal regardless of whether the error was harmless in the particular case." *United States v. Willis*, 647 F.2d 54, 58 (9th Cir. 1981). *See also Davis v. Alaska, supra*, 415 U.S. at 318. The Ninth Circuit's failure to reverse, therefore, cries out for review by this Court.

IV. The Prosecutor's Summation Exceeded the Bounds of Fair Comment, Thereby Denying Petitioner His Right to a Fair Trial.

The government's entire case, including Count 1, which incorporated the Bellingham operation into its charge of conspiracy, rested upon the proof that Sterling had been in Seattle on the weekend of July 25, 1981. The admission of his passport into evidence as well as Clement Pinder's testimony, though, showed that this was not the case. This evidence that Sterling had in fact been in the Bahamas fatally undercut the credibility of witnesses such as Griffin, Cubberly and Crues, who had all insisted that they had seen Sterling in Seattle on the weekend in question. Not surprisingly, then, the government sought to belittle this evidence by suggesting that the Bahamian stamps had been manufactured subsequent to Sterling's arrest. (II: 908) This suggestion, which was without basis in the record, unquestionably went far past the boundaries of fair comment and, in the process, denied petitioner his right to a fair trial.

The clear import of the prosecutor's comment was that Sterling had falsified his passport. This argument was devastating, for it suggested to the jury that the most crucial defense evidence was a fraud. Yet, there was absolutely no evidence in the record upon which the government could base a claim of falsification. The passport had been admitted into evidence, without objection, upon the testimony of Helen Sloan, a passport examiner for the Seattle Passport Agency. (II: 777-78) According to Ms. Sloan, a witness whom the government declined to cross-examine (II: 780), a stamp in a passport

indicates that the person holding the passport was in the location stamped on the date marked. (II: 779)

The case law firmly supports the view that where, as here, a prosecutor makes an attack upon a defense case which is not supported by any evidence, a reversal is warranted. In *Hall v. United States*, 419 F.2d 582 (5th Cir. 1969), the court reversed a conviction for interstate transportation of a stolen automobile because, *inter alia*, although there was no evidence to suggest that a government witness' non-attendance at trial was in any way caused by the defendant, the prosecutor suggested that the witness had been tampered with by the defendant. In reversing, the court stated: "[T]here was no evidence to support the charge of tampering by defendant . . . [and] [a]n inference not reasonably deducible from the evidence may not be stated." 419 F.2d at 585. *See also United States v. Rios*, 611 F.2d 1335, 1342 (10th Cir. 1979), *cert. denied*, 452 U.S. 918 (1980); *United States v. Peak*, 498 F.2d 1337, 1339 (6th Cir. 1974); *United States v. Russo*, 284 F.2d 539, 542, n.4 (2d Cir. 1960).

The Ninth Circuit had no quarrel with the case law. Rather, it assumed that misconduct had occurred, but held the error harmless because it was only "one isolated" comment "on a non-essential matter." (Appendix A at 10a) It is respectfully submitted that this conclusion is both factually and legally inaccurate.

The simple truth here is that, rather than being non-essential, Sterling's presence in Seattle on the weekend of July 25th was the most significant and hotly contested issue at trial. If Sterling had in fact been in the Bahamas that weekend, Griffin, Cubberly and Crues — the only witnesses that directly tied Sterling to Bellingham — were all lying in claiming they had seen Sterling in Seattle. Surely, it would take a leap into the world of fantasy to conclude that the jury would have still convicted Sterling even if it believed that he had not been in Seattle on those dates. Under these circumstances, the prosecutor's impropriety in suggesting that the stamp in Sterling's passport, showing that he had been in the

Bahamas on the weekend in question, was a fraud cannot be dismissed as relating to "a non-essential matter."

The prejudice caused by the improper argument was exacerbated by (1) the fact that it came at the very end of the government's summation and (2) the district court's overruling of defense counsel's objection, which "assured the jury that the Court accepted the propriety of [the prosecutor's] argument." *McFarland v. Smith*, 611 F.2d 414, 416 (2d Cir. 1979). *See also People v. Ashwal*, 39 N.Y. 2d 105, 111, 383 N.Y.S.2d 204, 207, 347 N.E.2d 564, 567-68 (1976).

In sum, then, the Ninth Circuit was plainly incorrect in failing to reverse Sterling's conviction. A writ of certiorari should be granted to remedy this error.

V. The Trial Court's Refusal to Grant the Defense a Short Continuance to Present Crucial Evidence Denied Petitioner a Fair Opportunity to Contest the Forfeiture of His Holdings.

Once a jury has found a defendant guilty of violating §848, it must determine whether or not his holdings, as specified by the government, are subject to forfeiture because they are either "[A] the profits obtained by him in [a §848] enterprise, [or] [B] any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprises." 21 U.S.C. §848 (a)(2). *See United States v. Spilotro*, 680 F.2d 612, 618 (9th Cir. 1982).

Here, the government alleged, in Count 1, that Sterling had fourteen forfeitable assets. The government's theory as to these holdings was that they were paid for out of Sterling's profits from his continuing criminal enterprise. The linchpin of this argument was the claim that Sterling had no sources of legitimate income and that all of his money, must therefore have come from the sale of controlled substances. (II: 898-99) Thus, it was crucial to the defense to present evidence showing that Sterling did indeed have legitimate income.

Yet, this opportunity was denied because the trial court's refusal to grant a less-than-24-hour adjournment (II: 792, 796-97, 809) deprived him of critical testimony regarding his involvement in the film industry.

In making this claim, petitioner is well aware that the "matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel." *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964). However, this discretion does not extend to "an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' " *Morris v. Slappy*, ___ U.S. ____, 103 S.Ct. 1610, 1616 (1983), *quoting Ungar v. Sarafite, supra*, 376 U.S. 589, and a denial of an adjournment "may be so arbitrary and so fundamentally unfair as to do violence to the constitutional principle of due process." *Gandy v. Alabama*, 569 F.2d 1318, 1323 (5th Cir. 1978).

Here, the denial of the request for a continuance was most certainly arbitrary, as it was apparently grounded upon the trial court's obligation to sit on a three-judge panel hearing a redistricting case. (July 23, 1982 transcript at 68) While another scheduling commitment is, of course, a legitimate concern for a trial court, it surely should not have been permitted to overshadow the defendant's right to a fair trial. This was a clear case of a court insisting "upon expeditiousness for its own sake..." *Giacalone v. Lucas*, 445 F.2d 1238, 1240 (6th Cir. 1971), *cert. denied*, 405 U.S. 922 (1972).[7]

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[7] Nor was this an isolated incident of obstinence by the trial court. As noted *supra* at 18, the court also rejected a request, joined in by counsel for both Sterling and the government that the charging of the jury be delayed for a few hours until the transcript of Lasky's grand jury testimony arrived from Syracuse. Additionally, the trial court had refused to delay the start of trial, thereby making it impossible for the defense to listen to over 200 hours of tape recorded conversations that had been delivered tardily by the government just one week before trial. (July 23, 1982 transcript at 71-76) The trial court's lack of

(footnote continued on following page)

Thus, the Ninth Circuit's affirmance of this decision cannot be squared with its obligation to ensure that justice was done. The court's attempt to circumvent its duty by claiming that the five requirements it had set down in *United States v. Hoyos*, 573 F.2d 1111 (9th Cir. 1978), were not met (Appendix A at 11a) is quite simply disingenuous. In asking for the overnight adjournment, the defense clearly fulfilled its obligation under *Hoyos* for it: (1) related the substance of the testimony and, thus, (2) implicitly demonstrated its competence; (3) made clear that the witness would be available the following morning; (4) showed that due diligence had been used, since the witness, a foreign national, had been expected to be present earlier, but had had visa problems; and (5) described the witness to the court, albeit without giving her name. (II: 792-97, 809-10)

Since it is, thus, clear that the Ninth Circuit flagrantly ignored this Court's teachings on a matter of tremendous import to petitioner, a writ of certiorari should issue to review this judgment.

(footnote continued from preceding page)
concern as to these matters is best summed up by its response to counsel's claim that "justice should have some consideration and compassion on time constraints" (II: 805-06): "In ten minutes we will take up the matter of instructions." (II: 806)

Conclusion

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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On the Petition

Dated: January 17, 1985

APPENDICES

Appendix A
Opinion of United States Court of Appeals

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 82-1640
D.C. # CR 82-86-1

Filed Sep. 10, 1984

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

ROBERT STERLING,
Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Washington
Jack E. Tanner, District Judge, Presiding
Argued and submitted October 4, 1983

Before: BROWNING, HUG and TANG, Circuit Judges.

TANG, Circuit Judge:

Appellant Robert Sterling was convicted of engaging in a continuing criminal enterprise, travelling interstate in aid of racketeering enterprises, possessing with the intent to distribute marihuana in excess of 1,000 pounds, conspiring to possess and distribute marihuana, and conspiring to import marihuana. Sterling on appeal raises numerous claims of trial error, including the allegation that the district court erred in allowing a government witness' testimony to stand despite the prosecutor's noncompliance with the Jencks Act, 18 U.S.C. § 3500. Sterling also argues that reversal is required as to the Continuing Criminal Enterprise con-

viction because insufficient evidence was introduced to support the jury's finding. We find two questions in this appeal worthy of extended discussion. They involve the Jencks Act "violation" and Sterling's attack on his Continuing Criminal Enterprise conviction. We find against Sterling as to these issues and because his other allegations of error are meritless, we affirm.

I. FACTS

In late July, 1981, government narcotics agents uncovered a large scale marihuana smuggling operation in Bellingham, Washington. According to government witnesses, the Bellingham operation was initiated in 1980 when Robert Sterling began making arrangements to ship a large quantity of marihuana from Columbia [sic] to Washington. A Panamanian freighter, the "Islander", was purchased at Sterling's direction and loaded with approximately 25,000 pounds of marihuana. At the same time, Sterling's associates were preparing for the offloading of the marihuana in Washington. Two smaller vessels, the "Tiki" and the "Courageous" were acquired to transport the marihuana from the Islander to the Washington coast. Houses were rented in Bellingham and Mount Vernon, Washington, to be used as initial "stash houses" for the marihuana.

On the 26th of July, the Courageous met the Islander and approximately 5,000 pounds of marihuana was loaded onto the smaller boat. It arrived in Bellingham late that night and was off-loaded with the marihuana being transported to the Mount Vernon house. The Tiki was loaded after the Courageous, and it arrived in the Bellingham area on July 27, 1981. That evening, federal agents arrested those involved in the operation at the Bellingham and Mount Vernon locations.

Eight months after the original arrest, Sterling was arrested and charged by the government as the master-

mind behind the Bellingham conspiracy. The bulk of the government's case against Sterling consisted of the testimony of individuals involved in the Bellingham scheme who had agreed to cooperate with the government. The government witnesses also testified concerning Sterling's involvement in other drug operations dating back to 1971. The major part of this testimony dealt with various importation and distribution schemes headed by Sterling in New York and Florida. The evidence implicated Sterling in numerous drug-related activities; beginning with rather small-scale transactions, increasing in sophistication to substantial importation schemes and culminating in the Bellingham operation.

Sterling was charged with one count of engaging in a continuing criminal enterprise (21 U.S.C. § 848), seven counts of travelling interstate in aid of racketeering enterprises (18 U.S.C. § 1952), two counts of importing marihuana (21 U.S.C. § 960), one count of possessing with the intent to distribute marihuana in excess of 1,000 pounds (21 U.S.C. § 841), one count of conspiring to possess with the intent to distribute marihuana (21 U.S.C. § 846) and one count of conspiring to import marihuana (21 U.S.C. § 963). After a nine-day jury trial, Sterling was convicted on all counts as charged. He was sentenced to forty years without possibility of parole on the Continuing Criminal Enterprise count and to four years each on the remaining substantive counts and fined a total of $225,000. The sentences as to the racketeering, importation and possession counts were to run consecutively but concurrent with the criminal enterprise sentence. The district court also imposed special parole terms of life as to one of the racketeering counts, one of the importation counts and the possession count. Sterling was not sentenced on the conspiracy to import and conspiracy to distribute marihuana counts. Pursuant to Section 848(a)(2) of the Continuing

Criminal Enterprise statute, the district court also ordered forfeiture as to seven real and personal properties owned by Sterling.

II. JENCKS ACT VIOLATION

Sterling argues that the failure of the government to comply with the requirements of the Jencks Act, 18 U.S.C. § 3500, requires reversal of appellant's conviction as to the Continuing Criminal Enterprise count and the conspiracy to distribute marihuana charge. We disagree.

William Lasky was called by the Government to testify against Sterling seven days into the nine day trial. At that time, Lasky revealed to the prosecutor that he had testified earlier before a federal grand jury in New York in connection with a matter related to the Sterling prosecution. The Government ordered delivery of the grand jury transcript but the information did not arrive in time for defense counsel to use in preparing his cross-examination of the witness. At the close of cross-examination, the trial judge granted Sterling permission to recall Lasky when the New York transcript became available but the material did not arrive before the close of defendant's case. The defense moved to strike Lasky's testimony pursuant to 18 U.S.C. § 3500(d). The motion was denied by the trial court.

The government concedes that Lasky's grand jury transcript was produceable [sic] under the Jencks Act, 18 U.S.C. § 3500(e). The government also admits that Lasky's New York grand jury testimony was not available to Sterling during cross-examination. The government argues, however, that the district court's decision not to strike the testimony of Lasky due to the government's inadvertent inability to make Lasky's grand jury transcript available was well within the discretion of the trial court.

The government's argument is well taken. A trial court has the discretion not to impose sanctions for noncompliance with the dictates of the Jencks Act. *United States v. Finnegan,* 568 F.2d 637, 642 (9th Cir. 1977). *See also United States v. Parker,* 549 F.2d 1217, 1224 (9th Cir.) *cert denied,* 430 U.S. 971 (1977) (trial judge has discretion to decide which sanctions, if any, should be assessed against the government for failure to comply with the Jencks Act); *United States v. Polizzi,* 500 F.2d 856, 893 (9th Cir. 1974) *cert. denied,* 419 U.S. 1121 (1975) (if the trial judge determines that a failure to disclose appears clearly to be harmless and is not a willful avoidance and egregious dereliction of the prosecutor's statutory obligation, then he need not invoke the drastic remedies of 18 U.S.C. § 3500).

In *Finnegan,* the defendant argued error in declining to impose sanctions upon the government for failing to produce interview notes of a government attorney which were discoverable under the Jencks Act. *Id.* at 642. The court held that even though the notes may have been subject to the provisions of the Jencks Act, the trial court had broad discretion in determining whether to impose Jencks Act sanctions. *Id.* The court stated that the trial court's decision whether to strike a witness' testimony should rest on (1) a consideration of the culpability of the government for the unavailability of the material and (2) the injury resulting to the defendant. *Id.*

The *Finnegan* court found that the trial court had not abused its discretion in declining to impose sanctions. The court noted that the loss of the materials was not intentional and perhaps not even negligent. *Id.* The court also observed that the defense was still able to cross examine vigorously the witness through other materials which were available to defense counsel. *Id.*

Applying the *Finnegan* criteria to the present case, the district court's decision not to impose sanctions on the government was well within its discretion. First, the government's failure was totally inadvertent and not due to any willful attempt to conceal statements from the defense. It is also clear that the government dutifully endeavored to comply with the requirements of 18 U.S.C. § 3500. All other Jencks Act statements of Lasky and the remaining government witnesses were produced for the benefit of defense counsel. Once the government prosecutor was aware of Lasky's New York grand jury testimony, he immediately requested that it be procured for use by defense counsel. Second, the record also demonstrates that no significant injury accrued to Sterling as a result of the nonavailability of the New York grand jury material. The New York transcript is essentially duplicative of other Lasky pretrial testimony which was given to defense counsel. Sterling's defense counsel was able vigorously to cross-examine Lasky using available materials. Moreover, even Sterling concedes that Lasky's testimony was not necessary to prove the charges against the defendant.

Contrary to Sterling's contentions, *United States v. Well*, 572 F.2d 1383 (9th Cir. 1978) does not demand a different result. In *Well*, the district court discovered at trial that all of the government's key witnesses had been interviewed before trial by a government agent. *Id.* at 1384. The government failed to comply with the defendant's Jencks Act request for the tape recordings. *Id.* The trial court declared a mistrial because of the Jencks Act violation. *Id.* On appeal, the government argued that the trial court erred in imposing sanctions under the Jencks Act where the defendant failed to show that he was materially prejudiced by the government's nondisclosure. *Id.* The *Well* court rejected the government's argument, holding that the defendant need not demonstrate prejudice. *Id.*

In its discussion of the requirements under the Jencks Act, the *Well* court stated that "if the government fails to produce [Jencks Act] statements, the court is required to strike the testimony of the witness." *Id.* However, unlike the present case, in *Well* the Jencks Act violation concerned pretrial statements of all three of the government's principal witnesses. In addition, no other essentially duplicative material was made available to defense counsel with which to cross-examine the government witnesses. Considering the substantial nature of the violation in *Well*, it is apparent that the district court would have had no choice but to strike the testimony of the witness or to declare a mistrial. Thus, in light of the general rule enunciated in *Finnegan*, *Polizzi*, and *Parker* that allows a district judge discretion in normal circumstances to decide whether to impose Jencks Act sanctions; the *Well* language is correctly interpreted as affirming the trial court's decision, under the facts before it, that it had no alternative but to declare a mistrial because of the government's failure to comply with the Jencks Act.

For the reasons stated above, the present fact pattern is analogous to the *Finnegan*, *Polizzi*, and *Parker* line of cases. We find no abuse of discretion in the trial court's decision not to impose sanctions on the government for the Jencks Act violation.

III. CONTINUING CRIMINAL ENTERPRISE CONVICTION

Sterling argues there was insufficient evidence to sustain his conviction for violating the Continuing Criminal Enterprise statute, 21 U.S.C. § 848. In order to prove a continuing criminal enterprise, the government must show that (1) the defendant's conduct constituted a felony violation of federal narcotics law (21 U.S.C. § 848 (b)(1)); (2) the described conduct occurred as part of a

continuing series of violations (21 U.S.C. § 848 (b)(2)); (3) the defendant undertook the activity in concert with five or more persons (21 U.S.C. § 848(b)(2)(A)); (4) the defendant acted as the organizer, supervisor or manager of the criminal enterprise (21 U.S.C. § 848 (b)(2)(A)) and (5) the defendant obtained substantial income or resources from the purported enterprise. (21 U.S.C. § 848(b)(2)(B)).[1] *See United States v. Lurz*, 666 F.2d 69, 75 (4th Cir. 1981), *cert. denied*, 455 U.S. 1005 (1982).

Sterling challenges only the sufficiency of the evidence to support the second of the five elements -- the continuing series of violations requirement. This circuit has interpreted a "continuing series" as consisting of three or more federal narcotics violations. *United States v. Valenzuela*, 596 F.2d 1361, 1367 (9th Cir.), *cert. denied*, 444 U.S. 865 (1979).

A.

The government argues that the fact that three narcotics violations are not specifically listed in the indictment may not necessarily work to invalidate a conviction under Section 848. *See Sperling v. United States*, 692 F.2d 223, 226 (2d Cir. 1982), *cert. denied*, ____ U.S. ____, .103 S.Ct. 3111 (1983) ("The law requires merely that there be evidence that the defendant committed three substantive offenses -- even if not charged in separate indictments -- to provide the predicate for a Section 848 conviction"). The government contends that evidence was introduced at trial of Sterling's drug-related activities dating back to 1971 and that the jury could have used evidence of these violations to satisfy the "continuing series of violations" requirement. We agree with the Second Circuit that there is no legal requirement that the violations which make up the continuing series be specifically listed in the indictment.

Sterling argues that even if it is accepted that the violations which comprise the "continuing series" need not explicitly appear in the indictment, in the present case the district court's instructions limited the jury to considering only those offenses. Sterling misapprehends the instructions given.

As noted above, five elements must be proved beyond a reasonable doubt for a conviction under Section 848. As the Fourth Circuit explained in *United States v. Lurz,* 666 F.2d at 76, "The elements are divided in two parts. First, it is necessary to prove the predicate felony violation (element one), and second, the other elements must be proved."

The trial court instructed the jury that they must find beyond a reasonable doubt, first, that the defendant committed a predicate offense -- some or all of the offenses listed in the indictment; and second, "that the offenses listed above were *part* of a continuing series of violations by defendant Sterling of the Federal narcotic laws." (emphasis added). Thus, the instructions stated that the offenses listed in the indictment need only be a *part* of the continuing series of violations, not that *only* offenses listed in the indictment could be considered in determining whether a series of violations had occurred. The government presented more than sufficient evidence from which the jury could find beyond a reasonable doubt that Sterling committed numerous felony violations of the drug laws over a number of years, including those for which he was indicted.

Appellant argues that a Section 846 conspiracy cannot be the predicate violation for a Section 848 offense. Since two of the five potential predicate offenses were conspiracies, appellant contends the Section 848 conviction must be reversed. We need not address this argument since the jury found appellant guilty of each of the five predicate offenses. Since any one of the three

substantive counts was sufficient to satisfy the predicate offense requirement we may disregard the jury's possible consideration of the conspiracy counts. *See United States v. Valenzuela,* 596 F.2d at 1364-65; *United States v. Losada,* 674 F.2d 167, 174 (2d Cir. 1982); *United States v. Michel,* 588 F.2d 986, 1000-01 (5th Cir. 1979).

IV. STERLING'S REMAINING ALLEGATIONS OF TRIAL ERROR

(1) Sterling's allegations of prosecutorial misconduct do not require reversal of his convictions. Sterling claims error as to only one isolated matter during the course of a nine-day trial. Even assuming without deciding that the prosecutor's comments during closing argument were error, such error would not require a reversal unless the error resulted in a serious possibility of prejudice to the defendant. *United States v. Jones,* 592 F.2d 1038, 1943 (9th Cir.) *cert. denied,* 441 U.S. 951 (1979). On the facts before us, we cannot say that the prosecutor's reference to evidence on a non-essential matter during closing argument resulted in a serious possibility of prejudice to the defendant.

(2) The court did not abuse its discretion by limiting defense counsel's cross-examinations of the government witnesses. The cross-examinations were vigorous and sustained, satisfying the demands of the confrontation clause. *See United States v. DeLuca,* 692 F.2d 1277, 1282 (9th Cir. 1982).

(3) The court did not abuse its discretion in refusing to grant defense counsel access to a government witness' psychiatric records. The district court examined the materials *in camera* and determined that the probative value of the records was substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury or by considerations of undue delay, waste of time or needless presentation of cumu-

lative evidence. *See* Fed. R. Evid. 403. We find that it was not an abuse of discretion for the district court to conclude that the evidence in question was inadmissible under Rule 403.

(4) We will not reverse the district court's denial of a continuance absent a clear abuse of discretion. *United States v. Barrett,* 703 F.2d 1076, 1081 (9th Cir. 1983). When a continuance is requested to obtain witnesses, the accused must show who they are, what their testimony will be, that the testimony will be competent and relevant, that the witnesses can probably be obtained if the continuance is granted and that due diligence has been used to obtain their attendance on the day set for trial. *United States v. Hoyos,* 573 F.2d 1111, 1114 (9th Cir. 1978). Sterling's offer of proof failed to meet the *Hoyos* requirement. The district court did not abuse its discretion in refusing to grant the continuance.

V. CONCLUSION

We find that the district court did not abuse its discretion in its decision not to impose sanctions on the government for the Jencks Act violation. We also find that the evidence introduced by the government was sufficient to support Sterling's continuing criminal enterprise conviction. Sterling's remaining allegations of trial error are meritless. Sterling's convictions are AFFIRMED.

Appendix A
Opinion of United States Court of Appeals

FOOTNOTES

[1] Section 848(b) states in pertinent part:

> A person is engaged in a continuing criminal enterprise if -
>
> (1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and
>
> (2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter -
>
> (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position or any other position of management, and
>
> (B) from which such person obtains substantial income or resources.

Appendix B
Order of United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 82-1640

Filed Nov. 20, 1984

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROBERT STERLING,
Defendant-Appellant.

BEFORE: BROWNING, HUG and TANG,
Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

A True Copy
Attest Nov. 28, 1984
Phillip B. Winberry
Clerk of Court

/s/ _____
by: Joseph Williams
Deputy Clerk

Appendix C
Constitutional and Statutory Provisions

Fifth Amendment, United States Constitution, provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Sixth Amendment, United States Constitution, provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Appendix C
Constitutional and Statutory Provisions

18 U.S.C. § 3500. Demand for production of statements and reports of witnesses provides:

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudi-

cation of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) thereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means --

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

(Added Pub.L. 85-269, Sept. 2, 1957, 71 Stat. 595, and amended Pub.L. 91-452, Title I, § 102, Oct. 15, 1970, 84 Stat. 926.)

21 U.S.C. § 848. Continuing criminal enterprise Penalties; forfeitures provides:

(a)(1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in paragraph (2); except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture prescribed in paragraph (2).

(2) Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States -

(A) the profits obtained by him in such enterprise, and

(B) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.

Continuing criminal enterprise defined

(b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if -

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter -

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

Suspension of sentence and probation prohibited

(c) In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and section 4202 of Title 18 and the Act of July 15, 1932 (D.C.Code, secs. 24-203 to 24-207), shall not apply.

Jurisdiction of courts

(d) The district courts of the United States (including courts in the territories or possessions of the United States have jurisdiction under subsection (a) of this section) shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as they shall deem proper.

(Pub.L. 91-513, Title II, § 408, Oct. 27, 1970, 84 Stat. 1265.)

References in Text. "Subchapter II of this chapter", referred to in subsec. (b), was in the original "title III", meaning Title III of Pub.L. 91-513, Oct. 27, 1970, 84 Stat. 1285. Part A of Title III comprises subchapter II of this chapter. For classification of Part B, consisting of sections 1101 to 1105 of Title III, see U.S.C.A. Tables volume.

The Act of July 15, 1932 (D.C.Code, secs. 24-203 to 24-207), referred to in subsec. (c), is not classified to the U.S.C.A.